IN RE ARBITRATION BETWEEN:

AFSCME COUNCIL 5

and

ITASCA COUNTY

DECISION AND AWARD OF ARBITRATOR

BMS Case # 06-PA-1243

JEFFREY W. JACOBS

ARBITRATOR

October 23, 2006

IN RE ARBITRATION BETWEEN:

AFSCME, Council 5

DECISION AND AWARD OF ARBITRATOR

and

BMS Case 06-PA-1243

Itasca County,

APPEARANCES:

FOR THE UNION:

Mitch Brunfelt, attorney for the Union
Lawrence Daigle, grievant
Lisa Sigfrinius, Network Telecom. Spec.
Christopher Worth, Network Telecom. Spec.
Darlene Ziegler, Operations Spec. MCIS
Tom Oakley, President ICEA
Peggy Clayton, Administrative Services

FOR THE CITY:

Steve Fecker, attorney for the County
Dana Flinck, MCIS Exec. Director
Robert Olson, County Coordinator
Louise Koglin-Fideldy, Ad. Services Supervisor
Gina Teems, Ad. Services Officer

PRELIMINARY STATEMENT

The hearing in the above matter was held on September 29, 2006. The parties presented documentary evidence and testimony at that time. The parties submitted post-hearing Briefs postmarked October 13, 2006 at which point the record was considered closed.

ISSUES PRESENTED

Did the Employer violate the provisions of the labor agreement and Article 9.5 when it posted for and hired an external applicant for the position of Information Systems, IS, Manager instead of the grievant? If so what shall the remedy be?

POSITIONS OF THE PARTIES

UNION'S POSITION

The Union's position is that the County violated the agreement when it posted internally and externally at the same time for the position of IS Manager and that the County should have hired the grievant as the qualified candidate instead of posting for an external candidate. In support of this position the Union made the following contentions:

1. The grievant is a 30-year employee with the County with an exemplary work record. The Union asserted that the grievant is not only a fine worker with a completely clean work record, his evaluations over time have been excellent, some would even say exemplary.

2. Moreover, the grievant scored 100% on his training and experience criteria. He possessed literally all of the necessary assets to perform the job.

3. In addition, the grievant is quite familiar with the computer systems utilized by the County and in fact has been consulted by the person who got the job over him with sometimes very basic questions about them. The Union asserted that there is no question that the grievant was amply qualified for the job and should have been hired before even posting for an external candidate.

4. The Union pointed to evidence it suggests showed that the County Coordinator knew that posting externally at the same time as internally would be a problem. They pointed to statements Mr. Olson made at a meeting called to discuss the retirement of the previous director and to outlining the process for finding a replacement wherein he stated that he would posted externally at the same time as internally and that he would "take the heat." Such statements strongly imply that he knew that the procedure he was about to follow was not that which is called for in the agreement nor by the longstanding practice within the County.

5. The Union pointed to the provisions of Article 9.5 in support of the claim that the County is required to post for promotional positions like this internally and then if and only if there are no qualified candidates do they post externally, or what is called open and competitive. Article 9.5 provides as follows:

> Promotional policy: Position vacancies in County service shall be filled by promotion of present employees who meet the requirements established for the classification and provided that the promotion would be in the best interests of the County.

6. The Union argued that the grievant clearly met requirements for the classification as he scored 100% on his training and experience criteria. The County cited the May 2, 2006 letter to the grievant in which the County notified him that he had scored the 100% on the T & E rating.

7. The Union further argued that there is a longstanding and consistent practice within the County to post internally. There is also a strong policy to hire internally as evidenced by the provisions of the County's own Employee handbook. See Union Exhibit 1 at page 23. The handbook states in relevant portion as follows:

> "it is the desire of Itasca County to provide employment opportunities to existing employees to promote in or transfer to vacant positions. In an effort to achieve this and in the event of a vacancy or new position, notification of the position will be posted internally for a period of at least five working days on a Promotional Notification of Position Vacancy form. If the position is not filled internally, outside recruiting sources will be used and an Open and Competitive Notification of Creation of Eligibility List Form will be completed and posted for a period of at least ten working day."

8. The Union pointed to these provisions and argued that this requires an internal posting first for at least 5 days. Here that was not done so the process was fatally flawed. Moreover, the Union asserted that the grievant was qualified as he scored 100% on the T & E rating and should have been hired at that point. It is only where there are no internal candidates that the County is allowed to post externally.

9. The Union introduced evidence to support its claim that for years, the process called for in the Handbook and the labor agreement has been followed. The County has posted internally and then if and only if there were no qualified candidates did they post externally. Here there was such a candidate and there never should have been an external posting.

10. The Union countered the claim that there have been exceptions by pointing out that several of the "exceptions" to the rules occurred before the first labor agreement and so do not even apply. The few that occurred after 1996, when the first labor agreement was signed were based on different facts. One such posting occurred when there were no internal applicants and the other occurred when there was a one day overlap in the postings. Clearly these were different factually. Thus, the Union argued, these do not negate the clear practice of posting internally first for the 5 days set forth in the handbook and then posting externally.

11. The Union countered the County's claim that the PELRA trumps the claim here. First the Union noted that this issue was raised for the first time in arbitration. Second, the language of the statues does not apply to supervisory units per se but in fact applies to a provision of a labor agreement that purports to limits the right of a Public Employer to select persons to serve as supervisory personnel of the employees covered by the labor agreement. In other words, it applies to any provision of a contract that limits only the right to select those persons who will supervise the employees in that labor agreement or to require the use of seniority in their selection. If the County were correct it would in fact obviate every supervisory labor agreement in the State and would negate the seniority clauses in all of those agreement. This is not what the legislature intended and leads to an absurd result.

12. Moreover, the Union argued that the strict terms of M.S. 179A.07 do not apply to County government but rather applies only to the *State* branch of government. The Union noted that the County even agreed with this interpretation since it agreed to the language found in Article 9.5.

13. The essence of the Union's claim is that there was a fatal flaw in the process used in that the County failed to follow the labor agreement and its own avowed policy by posting internally for this position. The County posted internally and at the same time externally as well. Moreover, the Union argued that the grievant should have been hired before there ever was an external posting since he was clearly qualified for the position of IS manager.

The Union requests an award granting the position of IS manager to the grievant in place of the external applicant who was hired.

COUNTY'S POSITION:

The County contended first the M.S. 179A.07 prevents this from even being considered. Further the County contends that there was no contractual violation here at all since the provisions of the labor agreement do not require only an internal posting under these circumstances. In support of this position the County made the following contentions:

1. That the provisions of M.S. 179A.07 subdivision 1 pre-empt this grievance and effectively negate the contract clause at issue. That statute provides in relevant part as follows;

> No public Employer shall sign an agreement which limits the right to select persons to serve as supervisory employees or state managers under Section 43A.18 subdivision 3, or requires the use of seniority in their selection.

2. The County pointed to that provision and argued that it pre-empts the contractual provision at issue here. Any language that thus limits the otherwise absolute right to select supervisory personnel is prohibited by law. Here it is undisputed that the employees covered by this agreement are supervisory personnel and supervise employees of their own. Thus the terms of the statute apply to pre-empt this entire matter.

3. On the merits, the County argued that the terms of the language of Article 9.5 when read in their entirety actually supports the County's claim here. The language requires that vacancies such as the one created here shall be filled by promotion of present employees who meet the requirements established for the classification and *provided that the promotion would be in the best interests of the County*. (Emphasis added.) That last clause gives back to the County the right to determine what is in the best interests of the County. While there is a preference to hire internally this is not and never has been mandatory.

4. The County argued that the arbitrator is mandated to determine the intent of the parties in interpreting contractual language. It is thus essential to examine the bargaining history to aid in that endeavor.

5. First, the County points to the origin of this clause. The negotiation history shows that the clause that now appears in Article 9.5 actually came from the County's personnel policy. With that language came a longstanding practice that the parties also clearly understood. That personnel policy language and the County's longstanding practice was to give preference to internal candidates but that it was not and never has been mandatory.

6. Second, the County argued that the Union attempted to change this clause unsuccessfully. The Union attempted to negotiate away the last clause, italicized above, that would have required a strict internal hiring process. The County rejected this proposal successfully in negotiations and the clause remained as it appears in the current agreement. This turn of events can only mean that the parties all knew that there was no strict requirement of an internal posting or hiring process and that the County always retained its right to hire based on its best interests.

7. The County also pointed to several instances where there were in fact both internal and external; posting and even hirings for bargaining unit positions. Moreover, while there have not been many such examples, there have been perhaps 15 or 20 promotional; opportunities in this entire unit in the approximately 10 years the Union has represented these employees.

8. The County also argued that the grievant was not in fact the best or even a very qualified candidate. The T & E score referenced by the Union is only the most preliminary determination of whether a person even meets the barest minimum qualifications. One of the requirements, worth 23.33% of the total 100% is whether the applicant has a valid Minnesota Driver's license. While important, such a requirement is hardly one that would set the grievant apart form the rest of the pack.

9. The County noted too that it could have required a college degree for the position at issue here but it did not. Only a high school education was formally required to apply. This was in some small part due to the desire to include more internal applicants, including the grievant, to apply. The grievant does not have a college degree and such a requirement would have taken him out of contention of the position entirely.

10. Further, the two finalists were both far more qualified to perform the functions of the IS Manager position. Thus while the grievant is a very competent person in the job he is doing, his years of experience did not automatically qualify him for the IS manager position. The person who was hired possessed more network experience, better supervisory experience and was experienced in budgeting.

11. The essence of the County's argument is thus that state law pre-empts this. On the merits, that the contract clause does not mean and never has been intended to mean that the County is mandated to hire or post *only* for internal candidate. The fact that they mostly have does not mandate that it do so in the future. Neither the contract nor the current Employee handbook requires an internal only posting. Finally, the applicant who was hired was hired due to her greater training, education and experience and was the candidate the County determined to be "in its best interests" to hire.

The County requests an award denying the grievance in its entirety.

MEMORANDUM AND DISCUSSION

Initially, the County raised the question of whether PELRA at 179A.07, subdivision 1 pre-empts this matter by rendering it moot and substantively non-arbitrable. It is undisputed that the employees covered by the contract are supervisory personnel and supervise other employees in a different unit or Union. The statute provides that "No public Employer shall sign an agreement which limits the right to select persons to serve as supervisory employees or state managers under Section 43A.18 subdivision 3, or requires the use of seniority in their selection."

The County's argument does not have merit however. The clear terms of the statute prevents a public Employer from signing an agreement that "limits the right to select persons to serve as supervisory employees." This interpretation of the statute would, if the County's position were adopted, obviate the seniority provisions in every supervisory contract in the State. Such cannot be the intent of the legislature. Moreover, there is some merit to the Union's claim that if the County's interpretation were true, it would never have agreed to the language in Article 9.5 in the first place. More reasonable is the view that the cited language prevents a public Employer from limiting its right to select supervisory personnel for the employees in the bargaining unit in the contract under examination. Thus, a line unit could not limit the Employer's right to select those who would supervise the *employees in that bargaining unit.* That language does not per se prevent a seniority clause or other limiting language from appearing in a bargaining unit of supervisors.

The Union raised an interesting point that the language of the statute applies only to State managers and would not apply to other political subdivisions of the State of Minnesota, i.e. like Itasca County. Given the determination above that the language of the statute does not prevent this matter from proceeding on the merits it is unnecessary to decide whether the terms of the statute apply to county government or not. No determination is made on that question. As noted above however, the matter can proceed to a determination on the merits of this dispute

The initial question then is whether the contract provisions of Article 9.5 require an internal posting in filling a vacancy. Here the County's arguments have greater merit than do the Union's. First, the contract language itself does not mandate that only an internal candidate get a promotional vacancy. The language provides that "position vacancies in County service shall be filled by promotion of present employees who meet the requirements established for the classification …" This certainly would appear to require that vacancies "shall" be filled by present employees. Certainly too if the language stopped there this case would be over. That would be the clear directive of the language and any vacancy filled with an external candidate where there was an internal candidate the present employees would be a violation of the contract.

The problem is of course that the language does not end there. It continues with the phrase "and provided that the promotion would be in the best interests of the County." It is not entirely clear from the language itself what that means but it clearly modifies the previous clause and provides the County escape language, for lack of a better term, from the requirements set forth in the beginning of the sentence to hire only internal candidates who meet the qualifications for the vacancy.

The County also provided compelling evidence of the bargaining history of this clause. Employer exhibit 2 shows that the Union desired a strict seniority system of filling vacancies when the first contract was negotiated between these parties. Employer exhibit 3 however shows that the language eventually agreed upon and placed in the first contract was essentially the very same language that appears there now.

Moreover, that language came directly from the County's personnel Policy Manual, See Employer Exhibit 4. The evidence showed too that under the County's Personnel Policy in place prior to the negotiation of the first labor agreement between these parties, there was no such mandate to post only internally and that the County retained the right to post and hire externally if it was deemed by the County to be in the best interests of the County to do so.

Second, there was again compelling evidence that the Union attempted to alter the language in bargaining but was unable to do so. Employer Exhibit 5 showed the ICEA Union's proposal for the 1996 contract negotiations. The Union's proposal would have deleted the latter clause set forth above and the language of the promotional article would have read, "position vacancies in County service shall be filled by promotion of present employees who meet the requirements established for the classification." The proposal would have deleted the reference to "best interests of the County."

Employer Exhibit 6 shows the County's response to this proposal and more importantly, the language of the contract did not change. The clear implication of this is that the language is not intended to mandate only an internal posting and allows the County to hire externally at the same time.

One of the time honored methods for determining the intent of contractual language is to look at the bargaining history and see if one party has attempted to alter the language through negotiations. This can be very strong evidence of what the parties themselves believed the language to mean and, depending on the facts, can be very strong evidence of what they were attempting to change with a proposal for different language. Here the evidence shows that the language came from an existing County Personnel Manual and that the parties understood what that language meant; i.e. that the County was not mandated to post only internally.

Here too, the attempt to alter the language is compelling evidence of the parties' understanding of the existing language and what it means. It was clear from these facts that the parties understood the language, which is reflected in the current agreement, to allow the County to post externally if it was deemed in the County's best interest.

The Union argued that the County has always posted internally first before going outside and that this consistent practice arose to the level of a binding past practice. Indeed, the evidence showed that the County has for the most part posted internally first and only then going to the open and competitive postings only when there were no qualified internal applicants and has in fact tended to prefer to hire internally for promotional vacancies where it can.

The evidence showed that there were very minor exceptions to this. Some of the instances cited by the County occurred prior to the parties' first contract and those that occurred later involved very minor overlaps in time. This evidence provided little support either way in this instance since the exceptions to the practice of posting internally first were rare and largely based on different facts.

That however does not end the inquiry. The larger question is whether this evidence arises to the level of a binding past practice. Here it did not.

Elkouri notes as follows:

> Arbitrators are often hesitant to permit unwritten past practice or methods of doing things to restrict the exercise of legitimate functions of management. For example, such hesitance was evidenced by Arbitrator Whitely McCoy: But caution must be exercised in reading into contracts implied terms, lest arbitrators start remaking the contracts which the parties themselves made. The mere failure of the Company, over a long period of time, to exercise a legitimate function of management, is not a surrender of the right to start exercising such right. … Mere non—use of a right does not entail a loss of it." Elkouri and Elkouri, How Arbitration Works, 5th Ed. at P. 635.

Further, Elkouri cited the famous admonition of Arbitrator Harry Shulman as one of the most cogent and provocative statements regarding the binding force of custom and past practice as follows:

> "But there are other practices which are not the result of joint determination at all. They may be mere happenstance, that is methods that developed without design or deliberation. Or they may be choices that developed by Management in the exercise of managerial discretion as to the convenient methods at the time. In such cases there is no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways, of doing things. The relevant item of significance is not the nature of the particular method but the managerial freedom with respect to it. Being the product of managerial determination in its permitted discretion such practices are, in the absence of contractual provision to the contrary, subject to change in the same discretion." Elkouri, supra, at p 636.

This latter citation appears to have particular cogency here. The language itself grants the County the discretion to decide to post internally or externally at the same time if it chooses. The fact that it decided to post internally initially for many years does not on these facts obviate the right to do so in the future. As these commentators have noted, even the consistent exercise of discretion does not create the obligation to exercise that discretion in a particular way in the future. Here the facts support the Employer's position that the language of the contract grants it the right to determine what the best interest of the County are and negates the Union's claim that there is a binding past practice here.

The Union further claimed that Mr. Olson made certain statements in connection with the vacancy whereby he acknowledged the problem with doing the posting in this way. He allegedly made statements to the effect that he would "take the heat" or words to that effect. The evidence showed that he may well have made these statements but these did not rise to the level of an admission of sorts or any acknowledgement to alter the terms of the contract.

The Union also alleged that Mr. Olson may have skewed the process to make sure the grievant did not qualify for the promotion. The evidence did not support this however. There was some evidence to suggest that the County had the absolute right to determine the qualifications, training and experience necessary to even apply for this job and that it could well have required a college degree. Since the grievant was shown not to have a college degree, making that a requirement would certainly have disqualified him from even applying. The County did not place that requirement on this position, which therefore allowed the grievant to apply for the job.

There were no facts to suggest any animus toward the grievant or that the process was adulterated in any way to give other applicants an unfair advantage or to place the grievant at a competitive disadvantage vis-à-vis other applicants. The evidence showed too that the T & E ratings were bare minimum qualifications and that getting 100% on these was only a threshold that allowed the applicant to get to the interview process. The Union did not assail the interview process itself. The evidence showed the interviews were fair and that the people doing them were qualified and impartial.

Finally, the Union intimated that the person who got the job was not as qualified as the grievant in certain job related areas and with some of the computer systems required to run the operation. The evidence showed the grievant to be a very competent worker familiar with the systems in place to perform his job. The Union claimed that the grievant is providing answers for very basic questions on some of these systems to the person who got the job. This claim does not carry the day on these facts.

First, the contract does not grant arbitral jurisdiction to compare applicants based on qualifications. The contract does not provide for a comparison of the relative ability of applicants. Thus, a decision granting the job to the grievant based on a comparison of the relative ability of the candidates would be outside the arbitrator's authority.

Second, there were insufficient facts to show that the successful applicant was not qualified even if the contract did grant the right to compare qualifications of the applicants. As noted, the evidence showed that the process to determine the most qualified candidate was free of unfairness, impartiality or preference toward or against any particular applicant. The evidence showed that the person hired had qualifications the grievant did not possess, even though he may well have certain knowledge that the successful applicant did not, and that she was in fact the candidate the County determined to be in its best interest to hire.

The question is whether the process used to post for the vacancy violated the contract or a binding past practice in some way. As noted above, neither the contract nor the other evidence in the matter provided sufficient support for the claim that the County was required to post only internally nor was there support for the claim that the County violated the labor agreement in any other way.

AWARD

The grievance is DENIED.

Dated: October 23, 2006

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Jeffrey W. Jacobs, arbitrator